FILED
JAN 16 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

315 U.S. 811

No. 870

SAMUEL BERNSTEIN,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

HERBERT ZELENKO,
Counsel for Petitioner,
One Park Place,
New York City.

INDEX

	PAGE
Petition	1
Summary Statement of the Matter Involved	1
Reasons Relied on for the Allowance of the Writ	7
Brief in Support of Petition	9
Opinion of the Courts Below	9
Jurisdiction	9
Statement of the Case	10
Specification of Errors	10
Statutes Involved	11
Argument	11
A—The Circuit Court erred in deciding that the action of the Trial Court in permitting proof of unrelated arrests and criminal charges against petitioner, thereby putting his character in issue, did not constitute reversible error	11
B—The rulings on evidence and the charge of the Trial Court which misinterpreted the indictment and the statute upon which it was based were so confusing that petitioner was denied a fair trial	12
Conclusion	14

TABLE OF CASES CITED

PAGE

Boyd v. United States, 142 U. S. 450, 458 (1891) 12

Brown v. United States, 83 Fed. (2) 383 (C. C. A. 3, 1936) 12

Eley v. United States, 117 Fed. (2) 526 (C. C. A. 6, 1941) 12

Greer v. United States, 245 U. S. 559, 560 (1917) 12

Hilliard v. United States, 121 Fed. (2) 992 (C. C. A. 8, 1941) 12

Mackreth v. United States, 103 Fed. (2) 495 (C. C. A. 5, 1939) 12

Tedesco v. United States, 118 Fed. (2) 737 (C. C. A. 9, 1941) 12

Tinsley v. United States, 43 Fed. (2) 890 (C. C. A. 8, 1930) 12

STATUTES CITED

Title 18, U. S. C., Sec. 550 ..... 6, 11

Title 21, U. S. C., Sec. 174 ..... 6, 11

Title 28, U. S. C., Sec. 347(d) 10

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No.

SAMUEL BERNSTEIN,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Samuel Bernstein respectfully shows:

I

Summary Statement of the Matter Involved.

Petitioner was convicted by a jury after a trial in the United States District Court for the Eastern District of New York upon an indictment (R. 8) charging him and four other defendants in two counts with (1) knowingly concealing and facilitating the concealment of three grains of morphine knowing that it was imported contrary to law, and (2) with knowingly concealing, transporting and facilitating the concealment and transportation of thirty-nine ounces of morphine knowing the same to have been so transported.

Petitioner was sentenced to serve a term of ten years and to pay a fine of $500, the same sentence to run concurrently on both counts of the indictment (R. 786).

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground that he had been denied a fair trial in that the Trial Court had permitted into evidence inadmissible and prejudicial proof of unrelated arrests and criminal charges and had confused the jury by misinterpreting the crime charged. The Circuit Court in an opinion by Judge A. N. Hand affirmed the conviction (R. 839).

The first question presented is:

Whether it is proper to put the character of a defendant in issue, in a criminal trial, through proof of arrests and criminal charges unrelated to the crime charged, and through instructions by the Trial Court to the jury that such proof should be considered by them, where the defendant did not testify or put his character in issue and where the crime charged did not involve proof of motive or intent.

At the trial, one Adelman, who had previously been convicted for possession of the narcotics in question, which had been found in his home, testified that about one month prior to his, Adelman's, arrest, petitioner had handled the narcotics. Two relatives of Adelman's testified to petitioner's presence in the Adelman home, but denied knowledge of the narcotics. Adelman further testified that it was not until approximately one year after his conviction that he had informed the authorities of petitioner's connection with the case.

There was no proof that the other defendants with whom petitioner was jointly indicted ever knew or saw him. No narcotics were produced in the court room, but a Government chemist testified that he had made tests prior to Adelman's trial and that the presence of narcotics was indicated on some of the utensils which were exhibits both in that trial and in the instant case.

The petitioner did not testify at the trial. Nevertheless, two Government agents were permitted to testify concerning petitioner's arrest in another and unrelated case in another jurisdiction in March, 1940, fourteen months after the alleged commission of the instant crime, as follows (R. 718) (Agent Olivera testifying):

> "Q. Give us the address? A. 31 West 85th Street. We told Mr. Bernstein—I introduced Mr. Rogers, a narcotic agent, and stated to Mr. Bernstein that we were Federal narcotic agents. He asked us if he could get dressed. We told him that he could. We placed him under arrest on the indictment. I asked the defendant if he would give us permission to search the premises. I called his attention to the fact that he had a constitutional right to refuse such permission; that we had the right to search on the basis of a warrant that we had for his apprehension. He had no objection to the search. We searched the premises. As we went in there on the right-hand side there was a couch. At the foot of that couch there was a small closet and from the closet we removed articles consisting of two of the last exhibits, 24 and 25 for identification."

It should be noted that the indictment in the instant case was not filed until June 4, 1940 (R. 7), several months after the arrest testified to above; the indictment referred to by Agent Olivera being another case.

And further concerning the same incident (R. 724):

> "Q. What question did you direct to Samuel Bernstein relative to this exhibit? A. I asked the defendant, Sam Bernstein, if this exhibit was one of the exhibits that belonged to his son. The defendant, Sam Bernstein, did not answer, remained silent. I further asked the defendant in relation to this exhibit if this was a sample of the opium he had given to Adelman."

Agent J. J. Rogers was also allowed to testify over objection and exception to the circumstances of the arrest

in March, 1940. There was no basis for the introduction of this testimony except to prejudice the jury. It concededly had no connection with the instant case.

Motions for a mistrial, a severance and to strike were all denied upon the ground that no authorities or precedents for such rulings were submitted to the Court (R. 745).

Adelman testified (R. 248):

> "Q. You had met Mr. Collins some time about ten or eleven years before? A. That is correct.
> Q. Connected with his official duties? A. That is correct.
> Q. As Customs Inspector. A. That is correct.
> Q. That was before you went to Brussels? A. That is correct.
> Q. Did your meeting with Collins have anything to do with narcotics? A. No, sir.
> Q. Nor with the place of your birth? A. No.
> Q. Nor with the arrest of any person other than yourself? A. He took me down as a witness against Sam Bernstein."

Counsel promptly moved for the withdrawal of a juror and for a mistrial. This motion was denied (R. 248).

Adelman testified further (R. 249):

> "Q. I ask you in plain words: you have just stated that you were taken as a witness; is that statement correct, yes or no? A. At the time he talked to me I was not a witness. He put me under bonds for a witness against him."

Counsel again moved for the withdrawal of a juror, for a mistrial and for a severance. This motion was denied with an exception (R. 249).

Despite objection, Narcotic Agent White related an incident in which he had a conversation with the defendant Lorber on February 24, 1939, six weeks after the arrest of Adelman, and not in the presence of the defendant Bernstein (R. 53):

> "Q. Please give us the conversation? A. Lorber asked me if I was looking for a man named Sammy, who had a very prominent disfiguration on his face. I said I was. I told him I believed Sammy was * * *."

It should be noted that the defendant Bernstein was referred to as Sam throughout the trial. There was no showing that this had any connection with the instant case.

It is unquestioned that none of the foregoing testimony had any connection with the crime charged in the indictment.

Not only did the Trial Court permit the prosecution to put petitioner's character in issue through this type of evidence, but in its instructions to the jury it directed the jurors' attention to the fact that this was a proper issue to be considered by them when it stated (R. 747):

> "Your task will consist almost exclusively in deciding who is telling the truth and in order to aid you in that process it seemed necessary to permit a very considerable latitude in inquiry into the activities and the conduct and manner of living, et cetera, of the chief characters in the case."

By its decision the Circuit Court disagreed with decisions of the Supreme Court of the United States and with decisions of other circuits when in its opinion it stated in substance that there was no merit to objection to the introduction of this prejudicial type of proof (R. 843). It overlooked the fact that intent or motive was not involved and that this evidence was inadmissible for any purpose. When the opinion stated that the Trial Court would have acted if requested, it disregarded the record of the proceedings which shows the Trial Court's refusal to strike or to sustain other objections to this evidence (R. 248, 249, 745).

The second question presented is:

Whether or not the Trial Court in its charge misinterpreted the statutes upon which the indictment is based

(Title 21, U. S. C., Sec. 174; Title 18, U. S. C., Sec. 550) and so denied petitioner a fair trial.

The rulings of the Court and its charge to the jury permitted the petitioner to be tried for crimes not charged in the indictment and so confused the issues involved that the petitioner was foreclosed from his right to a fair trial.

The petitioner was ostensibly on trial for possession of narcotics, yet the Court instructed the jury that the defendant was also accused of the crimes of illegal conspiracy, of manufacture and of sale of narcotics.

The simple issue of concealment or possession of illegally imported narcotics by the petitioner was not given to the jury to determine petitioner's guilt or innocence.

At R. 752 the Court stated as follows:

> "* * * The product as so treated, then had to get into circulation.
>
> Now the traffic in narcotics is like a legitimate enterprise. It is not sufficient that any articles in trade or commerce be manufactured. They must not only be manufactured but they must be sold. They must get into distribution; so you will see that the Government charges that these four defendants acting, some for one purpose and some for another, handled this acquisition of supplies, to fabricate a new substance and the distribution of the new substance, a completed thing. That is what the Government charges."

Further, at R. 753, after asking the jury to determine whether or not the witness Adelman could have accomplished the crime alone, the Court characterized the crime involved as a "well rounded enterprise", and then said:

> "* * * you then inquire as to whether these defendants or any one of them was shown by satisfactory and the required margin of proof to have been the persons as to one or all, who did co-operate or did aid and abet the accomplishment of that illegal and fairly well rounded enterprise."

After the main charge the defendant was compelled by necessity of the Court's interpretation to request the following (R. 827):

> "If the Jury does not find from the evidence that all of the defendants acted jointly as a single group they must acquit."

The Court refused to so charge and exception was taken (R. 769).

It is obvious that the Trial Court charged in this manner merely to bolster its previous erroneous rulings during the trial, when it had admitted evidence relating to the other defendants, showing their participation in many immoral and criminal activities unconnected with the petitioner (R. 268, 510, 182, 190, 326).

In a vast number of instances evidence was offered against and confined to isolated defendants (R. 48, 50, 51, 57, 60-65, 73, 77, 80, 81, 93, 96, 98, 100, 103, 105, 106, 108, 109, 112, 114, 115, 122, 123, 129, 135, 137, 144, 145, 147, 149, 151, 156, 158, 159, 160, 161, 163, 185, 186, 189, 318, 344, 370, 372, 380, 381, 382, 387, 388, 392, 399, 401, 404, 503, 694, 717, 720). Much of this did not in any way concern petitioner, but dealt with the criminal activities and associations of the other defendants with notorious criminals.

In each instance the Court instructed the jury that the testimony was to be considered only as to the defendant against whom it was offered; this instruction completely overlooked the human equation. It is not possible that any jury could have obeyed these instructions.

II

Reasons Relied On for Allowance of the Writ.

1

The decision of the Circuit Court of Appeals for the Second Circuit is in direct conflict with the applicable law established by the Supreme Court of the United States and by the various Circuit Courts which holds that the

character of a defendant is not to be put in issue in a criminal case through proof of unrelated arrests and criminal charges unless the defendant himself does so. This case does not involve proof of intent or motive. Therefore it does not fall within the sole exception to the settled law.

2

The charge of the Trial Court improperly interpreted a Federal statute (Title 21, U. S. C., Sec. 174) in that it instructed the jury that it included the crimes of illegal sale, manufacture and conspiracy to sell and manufacture narcotics. The charge and rulings on evidence utterly confused the issues. Petitioner was thereby denied a fair trial upon the indictment.

Petitioner believes that this decision seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court, had in the case numbered and entitled on its Docket Calendar No. 63, *"United States of America, Appellee* v. *Samuel Bernstein, Appellant,"* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated, January 8, 1942.

SAMUEL BERNSTEIN,
By HERBERT ZELENKO,
Counsel for Petitioner.